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CITATIONS

Statute:

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299004—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 768

GEORGE DIXON, JAMES COLE, HARVEY H. HESS, EDWARD A. TYRONE, AND W. A. MYATT, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 132–144) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 16, 1941 (R. 145). The petition for writ of certiorari was filed February 18, 1941. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules of this Court, promulgated May 7, 1934.

QUESTIONS PRESENTED

1. Whether the invoices in which the petitioners made false entries were "records required to be kept" under the provisions of Section 2857, Internal Revenue Code, 1939, and the regulations issued pursuant thereto.

2. If under Section 2857 the petitioners could be held criminally responsible for the false entries only if the form of the invoices was prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, an alternative question is whether this requirement was satisfied.

STATUTE AND REGULATIONS INVOLVED

Section 2857, Internal Revenue Code, 1939 (U. S. C., Supp. V, Title 26, Section 2857), provides:

> (a) Requirements.—Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quantities of five wine-gallons or more to the same person at the same time shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: *Provided,* That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and

under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, *or makes any false entry therein,*[1] or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

Every rectifier and wholesale liquor dealer who refuses or neglects to render

[1] The charges against the petitioners were based upon this clause.

> transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than $100 for each such neglect or refusal. [Italics supplied.]

Instruction No. 5 of the "Instructions for Wholesale Liquor Dealers" appearing on Form 338 (R. 119, 142)[2] provides that:

> The wholesale liquor dealer need not enter on Record 52, part 2 [Form 52B],[3] serial numbers of cases of distilled spirits removed from his premises: Provided, That he keeps in his place of business a separate record, approved by the District Supervisor, showing such serial numbers with necessary identifying data, including the date of removal and the name and address of the consignee. Such separate record

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[2] Form 338 is a monthly report required to be made by a wholesale liquor dealer to the District Supervisor of the Alcohol Tax Unit showing a recapitulation of all merchandise received and disposed of during the month.

[3] As stated by the Circuit Court of Appeals in its opinion (R. 139): "Form 52 is divided into two parts, one called 52–A and one called 52–B. On Form 52–A the wholesale liquor dealer was required to record within twenty-four hours after the transaction occurred a record of all receipts of liquor in the place of business, showing the distillery or manufacturer with its address, the brand of the liquor, proofage, the quantity and date received. On Form 52–B, the wholesale liquor dealer was required to record the name and address of the consignee to whom the liquor was sent, the brand thereof, the quantity and the proofage, and the serial number of the individual cases of liquor * * *."

See these Forms at R. 115, 117.

may be kept in book form (including loose-leaf books) or may consist of commercial papers, such as invoices or bills. Such books, invoices, and bills shall be preserved for a period of 4 years and in such a manner that the required information may be readily ascertained therefrom, and, during such period, shall be available during business hours for inspection and the taking of abstracts therefrom by Government officers.

Entries shall be made on such separate record not later than the close of business of the day on which the transactions occur. The wholesale liquor dealer, whose separate record has been approved by the District Supervisor, shall note in Record 52, part 2, column 13, that "Serial numbers shown on commercial records, per authority dated * * *."[4]

STATEMENT

On January 25, 1940, an indictment in forty-eight counts was returned against the petitioners and others in the District Court for the Western District of Arkansas (R. 8–66). Each count, differing only as to dates, names, and addresses, in substance charged that the petitioners and others, being officers, agents, and employees of Southwestern Distilled Products, Inc., a corporation

[4] It is conceded that these rules and regulations were lawfully prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury (Pet. 4; opinion below, R. 142, including footnote 2 thereon).

engaged in the business of a wholesale liquor dealer, made a false entry in a record of sales of distilled spirits required by law to be kept by the corporation, to wit, a commercial invoice or invoices. The entry falsely represented the name and address or the address of the person to whom the liquor was sold.

Each of the petitioners was found guilty on twenty-nine counts (R. 72–79), nineteen of the counts having been dismissed by the Government at the close of the evidence (R. 71). Sentences were imposed accordingly (R. 79–87).[5] The convictions were unanimously affirmed by the Circuit Court of Appeals for the Eighth Circuit (R 132–144).

The evidence, which the parties stipulated to be the "uncontroverted facts" (R. 92), is set forth in full in the opinion of the Circuit Court of Appeals (R. 134–141). The petitioners do not question that the evidence is amply sufficient to sustain their convictions if their conduct in making the false entries in the commercial invoices came within the prohibition of Section 285, *supra*, p. 3.

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[5] The five petitioners were sentenced as follows (R. 79–87): Dixon, a fine of $21,750 and imprisonment for eight years and two days; Cole, a fine of $5,000 and imprisonment for four years; Hess, a fine of $1,000 and imprisonment for two years; Tyrone, a fine of $500 and imprisonment for fifteen months; Myatt, a fine of $500 and imprisonment for fifteen months.

ARGUMENT

I

Petitioners assert that the form of the invoices in which the false entries were made had never been prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.[6] (Pet. 8). They contend that there can be no offense of making a false entry under Section 2857 of the Internal Revenue Code unless the false entry is made on a form so prescribed and approved (Pet. 7).

This contention disregards the plain language of the statute. In its first clause the statute provides that every wholesale liquor dealer who sells, or offers for sale a certain quantity of distilled spirits to the same person at the same time "shall keep daily * * * a record of distilled spirits received and disposed of by him." By a proviso in the same paragraph it is required that "The records shall be kept * * * in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe."

The second paragraph of the section provides that "The records required to be kept under the provisions of this section and regulations issued

[6] The form of the invoices, they say, was designed by themselves and was approved only by the District Supervisor of the Alcohol Tax Unit (Pet. 11).

pursuant thereto" shall be preserved for a certain period and during such period shall be available for inspection, etc.

The third and fourth paragraphs of the section are the penalty paragraphs. The third, the paragraph here involved, first provides that every wholesale dealer "who refuses or neglects to keep such records" i. e., records required to be kept under the provisions of the section and regulations issued pursuant thereto, "in the form prescribed by the Commissioner, with the approval of the Secretary," shall be punished. Petitioners were not charged, however, with failing or refusing to keep records in the prescribed form. They were charged, in each count, under a later clause of the paragraph which penalizes every wholesale liquor dealer who "makes any false entry therein," that is, "in such records,"—"the records required to be kept under the provisions of this section and regulations issued pursuant thereto."

It is obvious that such clause is not at all concerned with whether a form has been prescribed by the Commissioner for the record in which the false entry is made. The only requirement is that a false entry be made in a record required to be kept. The first paragraph of the section requires the wholesaler to keep a daily record of distilled spirits disposed of. And there can be no doubt that under Instruction No. 5 (*supra,* pp. 4–5) the wholesaler is required to keep commercial invoices and anal-

ogous records showing the serial numbers of cases of distilled spirits removed from his premises, "with necessary identifying data, including the date of removal and the name and address of the consignee," where he does not desire to enter the serial numbers of cases on Form 52B. It is conceded that this regulation is valid. Consequently, we submit, it is not open to dispute that the commercial invoices in which the false entries were made were "records required to be kept under the provisions of [the] section and regulations issued pursuant thereto" and that petitioners were properly convicted for making those false entries.

II

Even if the section be construed as punishing the making of false entries only where they are made on forms prescribed by the Commissioner with the approval of the Secretary, the forms of the commercial invoices in the instant case were, it would seem clear, so prescribed and approved. The proviso in the first paragraph of the section merely states that "The records shall be kept * * * in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe." This proviso does not require that, when the Commissioner exercises his discretion, he furnish specific forms nor does it compel him to descend into detail. A general description of what should be included in a particular

record is obviously enough. In Instruction No. 5 (*supra,* pp. 4–5), conceded to be valid, the Commissioner, with the approval of the Secretary, clearly and specifically stated the essential content of the separate record permitted to be kept by the wholesaler where he does not desire to enter on Form 52B the serial number of the cases of the distilled spirits sold by him. The instruction also provides that the "separate record may be kept in book form (including loose-leaf books) or may consist of commercial papers, such as invoices or bills." The content and the general form of the record were hence prescribed by the Commissioner and approved by the Secretary.

In the face of Instruction No. 5, it is clear that the power to prescribe the form of the separate record was not in anywise delegated to the District Supervisor of the Alcohol Tax Unit. As the Circuit Court of Appeals said (R. 144):

> There is no question here of the Supervisor having approved anything in the wholesaler's invoices other than those items of the forms which were specifically prescribed by the Commissioner with the approval of the Secretary. He did not assume to and did not exercise any legislative or regulatory power in merely checking the form of invoice with the prescribed requirements and approving the form that was obviously in compliance with the duly prescribed and approved requirements. * * *

There can be no doubt as to power of the Secretary to assign this ministerial duty to the Supervisor.[7]

The commercial invoices in which the false entries in the instant case were made were consequently, we submit, records the form of which was prescribed by the Commissioner with the approval of the Secretary.

CONCLUSION

The case was correctly decided below and there is involved no conflict of decisions or any important question of federal law. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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MARCH 1941.

[7] Section 3170 of the Internal Revenue Code provides that: "The Secretary is authorized to confer and impose upon the Commissioner and any of his assistants, agents, or employees, and upon any other officer, employee, or agent of the Treasury Department, any of the rights, privileges, powers, duties, and protection conferred or imposed upon the Secretary, or any officer or employee of the Treasury Department, or by any law now or hereafter in force relating to the taxation, exportation, transportation, manufacture, possession, or use of, or traffic in, distilled spirits, wines, fermented liquors, or denatured alcohol." (53 Stat. 373.)

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